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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

GLADYS HERNANDEZ; CELEDONIO HERNANDEZ, et al.,

Petitioners

vs.

JAMES THOMAS AND OSCAR CASTILLO,

Respondents

On Petition for a Writ of Certiorari to the Court of Appeals State of Arizona Division Two

PETITION FOR A WRIT OF CERTIORARI

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30 pp

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QUESTION PRESENTED

In a 42 U.S.C. 1983 claim, are Defendants entitled to qualified immunity when evidence shows that they lied in their application for a search warrant?

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

OPINIONS BELOW.....1

JURISDICTION.....1

STATUTORY PROVISION INVOLVED...3

STATEMENT.....3

REASONS FOR GRANTING
THE PETITION.....8

CONCLUSION.....13

APPENDIX.....A1

Unpublished Opinion of

Court of Appeals State of

Arizona, Division Two

Decided September 27, 1994
Order Filed Sept. 27, 1994

Unpublished Order of.....A18

Supreme Court State of Arizona

denying Petition for Review

Order Filed May 25, 1995

TABLE OF CASES AND AUTHORITIES

CASES **PAGES**

Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806 (1985). 10, 11

State v. Buccini, 167 Ariz. 550, 554 810 P. 2d 178, 182 (Ariz. 1991). 12, 13

Statute:

42 U.S.C. 1983

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

GLADYS HERNANDEZ; CELEDONIO HERNANDEZ, et al.,

Petitioners

vs.

JAMES THOMAS AND OSCAR CASTILLO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Mr. and Mrs. Hernandez (et al.) respectfully petition for a Writ of Certiorari to review the judgement of the Court of Appeals State of Arizona, Division Two.

OPINIONS BELOW

The Opinion of the Court of Appeals of the State of Arizona Division Two of September 27, 1994 is unreported. (App. 1-15) The Supreme Court of Arizona denied review on May 25, 1995.

JURISDICTION

The Court of Appeals entered its judgement on September 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a)

The Supreme Court of Arizona denied a Petition for Review on May 25, 1995.

The issue of qualified immunity was raised by Defendants in a Motion for Summary Judgement prior to trial. After Motion and Oral Argument, the Motion was denied.

After presentation of Plaintiff's case in chief, Defendant moved for directed verdict, said motion was denied. The matter had proceeded to trial a second time after the jury could not reach a verdict on the 28 U.S.C., 1983 civil rights complaint.

The jury returned a verdict in favor of Plaintiffs and Defendants appealed to the Court of Appeals for the State of

Arizona Division One.

The matter was transferred to Division Two of the Court of Appeals of the State of Arizona upon motion by Division One.

STATUTORY PROVISION INVOLVED

42 U.S.C. 1983

STATEMENT

This lawsuit was filed by Plaintiffs Gladys, Celedonio, Antonio, Jesus, and Samuel Hernandez (hereinafter "Plaintiffs") against the City of Phoenix and certain members of the Phoenix Police department under 42 U.S.C. 1983 and Arizona Common Law. The claims of Plaintiffs arise from Defendants' inadequate investigation, application for a search warrant and subsequent execution of same on the Hernandez family's home in the early morning hours of December 5, 1989.

Plaintiffs filed this civil action

September 23, 1991, naming as Defendants the City of Phoenix, its Police Department, Police Chief Ruben Ortega, R.D. Tyler, Eric Reed, J. Blasko, J. Garza, G. Gibbons, K. Knudsen, E. Mukati, K. Noyd, V. Piano, R. Welton, M. Geske, O. Castillo and J. Thomas. The complaint asserted claims under 42 U.S.C. 1983 (and other civil rights statues), assault and battery, false arrest, false imprisonment, and gross negligence.

On November 16, 1992, Defendants moved for partial summary judgment based on the officers' claim to entitlement of qualified immunity. Both sides filed voluminous briefs, which were fully considered by the Court. The Court denied Defendants' motion citing evidence that false information had been given in the issuance of the warrant by Defendant and that exculpatory evidence had been intentionally withheld. Defendants did

not request a written summary of the Courts findings nor file a motion for reconsideration.

On February 8, 1993, trial began. Defendants' motion for a directed verdict on the issue of Section 1983 liability and qualified immunity was denied. On February 12, 1993, the jury returned a verdict in favor of Defendants on the State claims and no verdict on Plaintiffs' section 1983 claims against Defendants Castillo and Thomas which were based on the intentional misrepresentation and suppression of exculpatory evidence in their application for the search warrant. A mistrial was declared on the Section 1983 claims as to Defendants Thomas and Castillo.

A second trial began March 15, 1993, alleging Section 1983 violations against Defendants Castillo and Thomas based on the their defective application for a

search warrant. The Court appropriately did not allow reference to the prior trial, which could be adequate grounds for a mistrial. Evidence regarding the execution of the search warrant was allowed for the sole purpose of ascertaining Plaintiffs' damages, a fact the Court made abundantly clear to all.

At the close of Plaintiffs' case-in-chief in the second trial, Defendants Castillo and Thomas again moved for a directed verdict in their favor alleging entitlement to qualified immunity from any Section 1983 liability. Plaintiffs', counsel again referred the Court to the evidence which demonstrated reckless and/or the intentional manner in which supposedly incriminating evidence was misrepresented and exculpatory evidence suppressed in Defendants' application for the warrant. The motion was denied by the Court after a full opportunity for

argument. Despite Defendants' advocation throughout the pretrial that the determination of qualified immunity was for the Court only, and after their summary judgment and directed verdict motions were denied, Defendants still sought such a determination from the jury through a maze of legalistic interrogatories. The Court denied use of such a format.

On March 18, 1993, the jury returned its verdict in favor of the Plaintiffs in the amount of $ 17,500.00 Plaintiffs' subsequent motion for attorney's fees in the amount of $ 45,605.00 and cost of $ 6,210.46 was granted in it entirety. (Minute Entry Order dated June 17, 1993). Judgment was thereafter entered on August 5, 1993. A Motion for New Trial/JNOV was subsequently denied. Defendants Thomas and Castillo thereafter filed their Notice of Appeal on October 11, 1993.

REASONS FOR GRANTING THE PETITION

The Trial Court correctly considered the qualified immunity issues on Defendants' Motion for Summary Judgement. The affidavit to the search warrant contained the following false statements:

1. We know that on 11-20-89 Jose Soto received at least 1 Kilo of cocaine.

2. We know from servaillance that Ramon Ochoa delivered cocaine to Jose Soto on 11-21-89 at 21 E. Southgate.

3. We know Jose Soto is a resident of 21 E. Southgate.

4. U.S. West records indicate Jose Soto was a subscriber to the telephone used at 21 E. Southgate.

Plaintiffs presented evidence that each of the above statements were untrue and unsubstantial. The Court considered Defendants' misrepresentation of the facts and their refusal to provide the subscriber information. The Court

determined that qualified immunity was not appropriate because of the lack of good faith and the fact that one warrant for the search of single family home was being used to search two separate homes.

The lower Court of Appeals relied on the facts as alleged by the Defendants including the allegation that they were unaware of the existence of two homes on the lot and that U.S. West did not indicate two residences. The lower Appellate Court held that the appropriate standard for review is as follows:

> "we will affirm the trial courts denial of a claim of Qualified Immunity by Government Defendants if, even under the Defendants version of the facts, their conduct violated law that was clearly established at the time "(Memorandum Decision of the Court of Appeals, Page 6.)"

The lower Court of Appeals has misinterpreted the holding in Mitchell v. Forsyth 472 U.S. 539, 105 5. Ct 2806, 86 L.Ed 2d 411 (1985). In that case the

court stated

> In cases where the District Court has denied Summary Judgement for Defendant on the ground that even under Defendants version of the facts the Defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the Defendant claims he took, Mitchell v. Forsyth Supra at 2816.

The footnote points out specifically the issue that is appealable is a purely legal one. Whether the facts alleged (by Plaintiff, or in some cases, the Defendant) support a claim of violation of clearly established law, Mitchelle v. Forsyth Supra at 2816 Footnote 9 emphasis added. Clearly, if the Defendants version of the facts indicate a violation of clearly established law, the issue of qualified immunity is simplified for the Courts review. However, in cases where the facts are disputed and evidence is produced that the Defendants misrepresented the facts in the affidavit

for the search warrant, the Plaintiffs' version of the facts should be considered.

The trial judge determined the Defendants did not act in good faith and denied the motions for Summary Judgement and Directed Verdicts. The jury determined that Defendants did in fact violate Plaintiffs constitutional rights.

The trial courts findings that the Affiant deliberately included misstatements of law or excluded material facts in a factual determination is to be upheld unless clearly erroneous. State v. Buccini 167 Ariz 550, 554 810 P 2.d 178,182 (Ariz. 1991)

When an affidavit that was submitted to a magistrate is later found to have been supported by false statements, the trial court must conduct an independent review of the effects of the false statements on probable cause because "the question turns on the consequence of a

fraud on the issuing magistrate which the magistrate was not in a position to evaluate. State v. Buccini 167 Ariz 555-556, 810 P 2d at 183-184.

Although the Appellate Court must conduct a De Novo Review because of the mixed question of law and facts, the Appellate Court must exercise its independent judgement measuring the facts, as found by the trier, against the constitutional standard of reasonableness. State v. Buccini 167 Ariz 556, 810 P 2d. at 184. (Emphasis added)

The Buccini Court went on to emphasize that when the earlier finding of probable cause was based on a set of facts, some of which are shown to be false, no reason exist to give deference to the earlier finding. When a court reassess a search warrant affidavit, a "Doubtful or marginal case should be resolved in Defendants favor, (In this

case the Plaintiffs in the civil matter, Defendant in criminal matters). It is appropriate to resolve marginal probable cause determinations in such a manner as will best uphold the integrity of the fourth amendment. State v. Buccini ID.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

GLADYS HERNANDEZ, CELEDONEO HERNANDEZ, individually, as husband and wife and as parents and next friends of ANTONIO HERNANDEZ, JESUS HERNANDEZ and SAMUEL HERNANDEZ, minor children,	2 CA-CV 94-0131 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28 (a) (2) Rules of Civil Appellate Procedure
Plaintiffs/Appellees	
v.	
JAMES THOMAS and OSCAR CASTILLO,	
Defendants/Appellants	

APPEAL FROM THE SUPERIOR COURT OF

MARICOPA COUNTY

Cause No. CV 91-22341

Honorable Marilyn A. Riddel, Judge

REVERSED

Robert Andy Rojas Glendale

Attorney for Plaintiffs/Appellees

Jones, Skelton & Hochuli
by John T. Masterson Phoenix
and David C. Lewis

Attorney for Defendants/Appellants

E S P I N O S A, Presiding Judge.

Defendants/appellants Oscar Castillo and James Thomas detectives with the Phoenix Police Department, appeal from a jury verdict in favor of plaintiffs/appellees Gladys and Celedoneo Hernandez (the Hernandezes) on their 42 U.S.C. 1983 claim based on a search of their home pursuant to a warrant. Castillo and Thomas contend that the trial court erred in denying their motion for directed verdict because there was probable cause to support their search warrant and they were entitled to qualified immunity. We agree and reverse.

Factual and Procedural Background

As part of a large-scale narcotics trafficking investigation, Phoenix police obtained a judicial wire tap order authorizing the monitoring of telephone calls of a suspected drug dealer, Elpidio Duran. monitored conversation led police to investigate Enrique Castillo,1 who in turn, led them to Jose Soto, a tenant of the Hernandezes. Police were unaware that Soto rented a guest house not visible from the street on the same lot behind the Hernandezes' home and that he shared the 21 East Southgate address. Through the wire tap, police were able to ascertain the number of the telephone Soto was using. Information obtained from U.S. West Communications showed that phone number belonged to Soto at the service address of 21 East Southgate, but did not indicate multiple dwellings at the address. Police never saw nor attempted to obtain an actual telephone bill, which

would have revealed that Soto's phone number was assigned to the rear structure, nor did they check county property

---

1 Because appellant Castillo and Enrique Castillo share the same last name, we will refer to Enrique Castillo by his alias, Cachettes.

records, which would have indicated multiple residences on the property.

Between Novmeber 18 and November 24, 1989 police intercepted eleven conversations between Soto and Cachettes arranging the purchase of various quantities of cocaine. At least six of these calls originated from 21 East Southgate, where he parked his car, spoke with someone in the front yard, and then crossed the street with his briefcase where he met Soto at 20 East Southgate. During a November 21 phone conversation, Soto gave Cachettes instructions to deliver cocaine to him. A surveillance officer followed Cachettes's delivery man

to the vicinity of 21 East Southgate and lost sight of him in an alley behind the house. The delivery man's car was latter seen parked in the alley between 21 East Southgate and the house next door. The surveillance officer did not notice that there were two structures on the property because it was dark and his view was obstructed by some bushes; however, he later returned to the area to see if he could determine exactly where the delivery man had gone and noticed the second structure. The next day Soto called Cachettes from 21 East Southgate to inform him that Soto had the cocaine.

Using this information, Castillo and Thomas secured a search warrant for 21 East Southgate as part of a larger search operation involving twenty-two other locations. On December 5, Phoenix police officers entered the Hernandez home to execute the warrant. The warrrant listed

the location to be searched as "21 East Southgate, single family residence of block construction, white in color, front door fences north, driveway on the east side. The house is the third structure east of Central and on the south of Southgate." The warrant did not refer to any separate structures on the property.[2] No contraband was found in the Hernandezes' home, but police discovered approximately 260 pounds of marijuana and $ 50,700.00 in cash in the guest house. No cocaine was found.

The Hernandezes sued the City of Phoenix, the Phoenix Police Department, the chief of police, and thirteen officers, including Castillo and Thomas, in their official and individual capacities, asserting that their federal civil rights had been violated under 1983 and raising state claims for assault and battery, false arrest, false imprisonment,

negligence, gross negligence, and

---

2 While there was testimony that the police were aware of the separate structure prior to the execution of the warrant, contrary to appellees' assertions, there is no evidence that they were aware the structures were separate residences.

emotional distress. In their 1983 claim against Castillo and Thomas, the Hernandezes alleged that the officers secured the warrant "without confirming or investigation the actual location of Jose Soto's residence."

Castillo and Thomas moved for summary judgement on the civil rights violation on grounds they had acted in good faith pursuant to a search warrant supported by probable cause and were immune from civil liability because they did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." The trial court denied the motion. The matter

proceeded to trial and the claims for assault and battery, false arrest, false imprisonment, and negligence were dismissed, as were some of the defendants. The jury returned defense verdicts on all claims, except the 1983 claim against Castillo and Thomas, which resulted in a hung jury and a mistrial.

The matter proceeded to trial a second time. At the close of the Hernandezes' case, Castillo and Thomas moved for a directed verdict, reasserting the arguments they had advanced in their summary judgment motion. The trial court denied the motion. The trial court denied the motion , and the jury found in favor of the Hernandezes. The trial court later denied Castillo and Thomas's motion for judgment notwithstanding the verdict.

Standard of Review

Castillo and Thomas asserted a qualified immunity claim in their motions

for summary judgment, directed verdict, and judgment notwithstanding the verdict and raise the trial court's denial of these motions as reversible error. The Hernandezes contend that the standard of review is one of deference to the trial court's discretion. We distinct form the merits of the case. **Hunter v. Bryant**, 502 U.S. 224, 112 S. Ct 534, 116 l. Ed. 2d 589 (1991). We will affirm the trial court's denial of a claim of qualified immunity by government defendants if, even under the defendants' version of the facts, their conduct violated law that was clearly established at the time. **Mitchell v. Forsyth**, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985); **Henke v. Superior Court**, 161 Ariz. 96, 775 P. 2d 1160 (App. 1989). On questions of law, our review is de novo. **City of Phoenix v. Superior Court**, 170 Ariz. Adv. Rep. 68 (Ct. App. August 4, 1994).

Qualified Immunity

The doctrine of qualified immunity shields government officials performing discretionary functions from civil liability so long as their actions could reasonably have been thought to be consistent with the rights they are alleged to have violated. **Anderson v. Creighton**, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). Castillo and Thomas are not entitled to immunity "if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." **Malley v. Briggs**, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271, 278 (1986). The shield of immunity is lost "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official

belief in its existence unreasonable." Id. at 344-45, 106 S. Ct. at 1098, 89 L. Ed. 2d at 281.

In denying the motion for directed verdict, the court stated, "As a trial judge, every time I hear reasonable, they should have done it, that's for a jury to determine." However, the reasonableness of Castillo's and Thomas's actions and whether they were entitled to qualified immunity was a matter of law for the trial court to decide, not an issue of fact for the jury. **Hunter v. Bryant, supra.** In that case, the Supreme Court overruled a Ninth Circuit decision, which held that whether a reasonable officer could have believed he had probable cause was a question for the trier of fact and that summary judgment based on a lack of probable cause is proper only if there is but one reasonable conclusion a jury could reach. The Court rejected that approach,

finding the question of immunity one for the trial court, not the jury. The Court ruled that the trial court "should ask whether the [defendants] acted reasonably under settlement law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed. . . after the fact." Hunter, 502 U.S. at ___, 112 S. Ct. at 537, 116 L. Ed. 2d at 596 (emphasis added).

Castillo and Thomas argued that reasonable officers could have believed that the description in the search warrant affidavit was constitutionally adequate. Probable cause to issue a warrant exists "when the facts and circumstances presented to the magistrate are based on personal knowledge or trustworthy information sufficient to warrant a person of reasonable caution to believe that seizable items are located on the premises

to be searched." State v. McCall, 139 Ariz. 147, 156, 677 P. 2d 920, 929 (1983), cet. denied, 467 U.S. 1220 (1984). Assessment of the validity of a warrant must be based on information that the officers disclosed or had a duty to discover and disclose to the issuing judge. Maryland v. Garrison, 480 U.S. 79, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987). Evidence that emerges after a warrant is issued has no bearing on whether or not it was validly issued. Id.

The Hernandezes generally repeatedly contend that Castillo and Thomas "lied" and withheld significant information in securing the warrant. More specifically, they assert that the officers conducted no investigation to determine Soto's residence or the occupants of 21 East Southgate, nor did they surveil the address. The assertions are not supported by the record. As a result of a valid

wire tap of Cachettes's phone, police successfully procured a "tap and trace" on the phone Soto was using. Information obtained from the telephone company showed that the number belonged to Soto at 21 East Southgate, not "21 East Southgate rear." Although the Hernandezes' expert testified that his review of police records showed that no surveillance was initiated at 21 East Southgate, Officer Nordlin testified that he followed Cachettes's delivery man to the vicinity and saw his car parked behind the house. A subsequent phone call from Soto to Cachettes, originating from the same number at 21 East Southgate, confirmed the delivery of the cocaine. The officers' knowledge that Soto maintained addresses across the street at 20 East Southgate and nearby on West Riverside and their failure to include this information in the search warrrant affidavit does not negate the

probability that contraband could be found at 21 East Southgate.

Detective Thomas testified that someone was sent to 21 East Southgate before the warrant was executed to see what was located there. That he was unable to remember who was sent or what happened to notes describing the property is irrelevant to the validity of the warrant. Furthermore, a visual inspection of the front of the house in order to secure a description would not have revealed the existence of a separate residence in the back because it was not visible from the front. While it is apparent with the benefit of hindsight that "more diligent investigation" would have revealed that Soto occupied only the rear structure, on the facts that Castillo and Thomas possessed at the time they swore out the affidavits to secure the warrant, probable cause existed to search

the premises. Qualified immunity " 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" Hunter, 502 U.S. at __, 112 S. Ct. at 537, 116 L. Ed. 2d at 596 (quoting Malley, 475 U.S. at 343, 341, 106 S. Ct. at 1097, 1096, 89 L. Ed. 2d at 280, 278). If officials of reasonable competence could disagree on a course of conduct, that conduct should be protected. Malley, supra. Here, on an objective basis, reasonably competent officers would conclude that a warrant should issue, or at best, officers of reasonable competence could disagree on this issue, thus, Castillo and Thomas are entitled to qualified immunity.

The trial court's judgment in favor of the Hernandezes is reversed. As the Hernandezes are no longer prevailing parties, the award of attorney's fees and

costs is vacated. 42 U.S.C. 1988 (b).

SUPREME COURT

STATE OF ARIZONA

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May 25, 1995

RE: GLADYS HERNANDEZ et vir/ANTONIO HERNANDEZ et al vs. JAMES THOMAS/OSCAR CASTILLO
Supreme Court No. CV-94-0574-PR
Court of Appeals No. 2 CA-CV 94-0131
Maricopa County No. CV 91-22341

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 23, 1995, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to Court of Appeals, Division Two, Tucson, this 25th day of May, 1995.

NOEL K. DESSAINT, Clerk

TO:

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